

Before the  
Administrative Hearing Commission  
State of Missouri



OFFICE OF TATTOOING, BODY  
PIERCING AND BRANDING,

Petitioner,

v.

JEREMY E. ZAPATA,

Respondent.

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No. 13-1271 TP

**DECISION**

Petitioner Office of Tattooing, Body Piercing, and Branding has cause to discipline Respondent Jeremy Zapata's tattooist license.

**Procedure**

The Office filed its complaint on July 16, 2013. The Office personally served Mr. Zapata at the Eastern Reception, Diagnostic and Correctional Center (ERDCC) in Bonne Terre, Missouri, on July 31, 2013. Mr. Zapata filed a response on August 6, 2013. He denied that he was guilty of the crimes that form the basis for the complaint. He also suggested that we wait for the appeal in his criminal case to be concluded, until proceeding further herein. We did not and will not stay these proceedings on such basis, and will address the reasons in the section immediately below.

The Office filed a motion for summary decision on September 11, 2013, and we sent a letter to Mr. Zapata on September 12, 2013, inviting him to respond. On September 25, 2013, the Office filed a certificate of service, stating that the motion for summary decision had been mailed to the wrong address, and a second copy was mailed to Mr. Zapata at the right one, the ERDCC. We sent a letter to Mr. Zapata at the ERDCC on September 27, 2013, and permitted him until October 15, 2013 to respond to the Office's motion. He did not file suggestions in opposition or any other response.

Under 1 CSR 15-3.446(6)(A)<sup>1</sup>, we may grant summary decision if a party establishes facts that entitle the party to a favorable decision and no party genuinely disputes such facts. Those facts may be established by stipulations, pleading of the adverse party, or other evidence admissible under the law. 1 CSR 15-3.446(6)(B). The following facts are undisputed and drawn from the certified documents attached to the Office's motion for summary decision, and Mr. Zapata's answer.

#### **Mr. Zapata's Request to Stay the Proceedings**

Mr. Zapata states in his answer of August 6, 2013 that we should wait until after the appeal process concludes because if he prevails in his appeal, the Director's claims will be "void." We decline to do so.

A judgment is final when the trial court imposes sentence. *Yale v. City of Independence*, 846 S.W.2d 193, 194 (Mo. banc 1993); *State v. Nelson*, 9 S.W.3d 687 (Mo. App. E.D. 1999). Mr. Zapata has been convicted and sentenced, so the judgment against him is final. As discussed in the Conclusions of Law section below, the disciplinary statute at issue here requires final adjudication of guilt of a qualifying crime. It does not require appeals to have been exhausted.

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<sup>1</sup> References to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

Moreover, because Mr. Zapata's conviction is final, he is estopped from denying he committed the crimes. *Carr v. Holt*, 134 S.W.3d 647, 649 (Mo. App., E.D. 2004) (citing *James v. Paul*, 49 S.W.3d 678, 682-83 (Mo. banc 2001)). Under the plain terms of the disciplinary statute, the fact of his appeal makes the instant case no less ready for resolution.

Nor is a stay otherwise appropriate. The purpose of a system of professional licensure is to protect the public. *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 25 (Mo. App. E.D. 1997). Statutes authorizing the regulation and discipline of professional licenses "are remedial [ones,] enacted in the interest of the public health and welfare and must be construed with a view to suppression of wrongs and mischiefs undertaken to be remedied." *Bhuket v. State ex rel. Missouri Bd. of Regis'n for the Healing Arts*, 787 S.W.2d 882, 885 (Mo. App. W.D. 1990).

In an analogous context, the Missouri Supreme Court has concluded that the public welfare takes priority over an individual's hope that his conviction might be overturned. In *State ex inf. Peach v. Goins*, 575 S.W.2d 175, 181-83 (Mo. banc 1978), the Court permitted the ouster of a public official, a sheriff, on the basis of his federal felony conviction, even though he was appealing it at the time. The Court explained that after a felony conviction,

the presumption of guilt immediately attaches, and this presumption is not destroyed or abrogated by an appeal. It is against public policy and against the best interests of sound government that one convicted of a felony shall continue to ... enjoy the privileges and prerogatives (of public office). The rights of the public must be paramount to the rights of the individual

*Id.* at 183 (quoting *State v. Langer*, 256 N.W. 377, 389 (N.D. 1934)). A professional license is likewise a privilege granted by the state, and "subject to the laws and regulations which authorized its issuance in the first place[.]" *Mo. Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 691 (Mo. App. W.D. 2010).

The disciplinary statute at issue here does not require an appeal to have concluded for the disciplinary action to proceed. And permitting a convicted licensee to continue to enjoy the benefits of licensure despite conviction, on the basis of a pending appeal, would contradict the purpose of professional licensure, and violate public policy.

Moreover, we see nothing in statute or regulation that would prohibit Mr. Zapata from re-applying for licensure should he ultimately succeed in his appeal.

Therefore, we decline to stay these proceedings.

### **Findings of Fact**

1. Jeremy E. Zapata is licensed by the Division of Professional Registration, Office of Tattooing, Body Piercing, and Branding as a tattoo artist. His license was current and active at all times relevant to this proceeding.

2. Mr. Zapata was charged in the Greene County, Missouri, Circuit Court with four counts of first-degree statutory sodomy with a victim under 14 years of age, violations of § 566.062.1, RSMo.<sup>2, 3</sup>

3. On August 1, 2012, a jury found Mr. Zapata guilty on all four counts.

4. On November 21, 2012, the Greene County Circuit Court sentenced Mr. Zapata to twenty-five years on each count and ordered that the sentences run concurrently.

### **Conclusions of Law**

We have jurisdiction of the Office's complaint seeking to discipline Mr. Zapata's tattooist license. § 324.523.1 and § 621.045, RSMo (Supp. 2012).

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<sup>2</sup> (Cum. Supp. 2006).

<sup>3</sup> The child was in fact between 5 and 7 years old at the times of the various four offenses. Mr. Zapata touched the child's vagina with his penis, mouth, and fingers; and placed his penis in her mouth.

Pursuant to 20 CSR 2267-1.010(20), the Director of the Division of Professional Registration is responsible for the licensure and discipline of tattooists under the provisions of §§ 324.520—324.526, RSMo (Supp. 2012), and created the Office to carry out those responsibilities. The Office must prove that cause for discipline exists by a preponderance of the evidence. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012) (dental licensing board demonstrated “cause” to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo.App. W.D. 2000)).

Here, the Office alleges cause exists to discipline Mr. Zapata’s license under § 324.523.1(2):

The division may ... cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required under sections 324.520 to 324.526, ... for any one or any combination of the following causes:

\* \* \*

(2) Final adjudication and finding of guilt ... in a criminal prosecution under the laws of any state or of the United States, for any offense reasonably related to the qualifications, functions, or duties of any profession that is licensed or regulated under sections 324.520 to 324.526, and the regulations promulgated thereunder, for any offense an essential element of which is fraud, dishonesty, or an act of violence, or for any offense involving moral turpitude, whether or not sentence is imposed[.] [Emphasis added.]

We address the elements of subsection (2) in turn.<sup>4</sup>

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<sup>4</sup> The Office provided scant briefing with its motion and did not address the components of § 324.523.2(2) separately. We believe we can adequately discern the issues here. But we caution the Office that sufficient briefing is an aid to our understanding of the record and the arguments, and we generally expect such briefing to be provided.

## **I. Final adjudication**

We conclude there was a final adjudication and finding of guilt in a criminal proceeding.

“A criminal judgment is final when the sentence and judgment finally dispose of all issues in the criminal proceeding, leaving no questions to the future judgment of the court.” *State v. Eisenhouer*, 40 S.W.3d 916, 918 (Mo. banc 2001). Here, a jury found Mr. Zapata guilty on all four counts and the trial court sentenced him on all four. Nothing remains for the trial court to do.

There was a final adjudication and finding of guilt in Mr. Zapata’s criminal case.

## **II. Qualifying offense—reasonably related, essential element, or moral turpitude**

Section 324.523.2(2) next requires that the licensee have committed an offense reasonably related to the qualifications, functions or duties of the profession; or an offense having an essential element of fraud, dishonesty, or act of violence; or an offense involving moral turpitude. We conclude Mr. Zapata’s offenses are reasonably related to the profession, and involve moral turpitude, but do not have any of the specified essential elements, as discussed below.

### **A. For an offense reasonably related**

Mr. Zapata’s offenses of first-degree statutory sodomy are reasonably related to the qualifications, functions, or duties of a tattooist.

Section 566.062.1 defines first-degree statutory sodomy as “ha[ving] deviate sexual intercourse with another person who is less than fourteen years old.” Deviate sexual intercourse is

any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object done for the purpose of

arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim[.]

§ 566.010(1), RSMo (Cum. Supp. 2006).<sup>5</sup>

A tattoo is “an indelible mark made on the body of another person by the insertion of a pigment under the skin” or “an indelible design made on the body of another person by production of scars other than by branding.” § 324.520.1(5). *See also* 20 CSR 2267-1.010 (same). Regulations governing the practice of tattooing in Missouri acknowledge that tattoos can be applied all over the body, including the genital area. 20 CSR 2267-3.010(2)(F) (requiring a privacy panel or other barrier to be used during tattooing of the genital area, to separate patron from view of observers or other patrons).

The law and regulations governing tattooists are specific and fairly extensive. An applicant for a tattooist license must have completed courses in blood-borne pathogen training, first aid, and cardiopulmonary resuscitation, and either an apprenticeship or an educational program. 20 CSR 2267-2.010(2). The applicant must also have practical experience in tattooing. *Id.*

A tattooist cannot be under the age of 18. § 324.520.5. A tattooist cannot knowingly tattoo a person under the age of 18, unless the tattooist first obtains the written, informed consent of the minor’s parent or legal guardian. § 324.520.1(4) and .2. The parent or legal guardian must execute the written, informed consent in the presence of the person performing the tattooing or the tattooist’s employee or agent. *Id.* In any case, the tattooist must verify through proper picture identification that the patron requesting the tattoo is at least 18. 20 CSR 2267-5.020(5).

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*Id.*

The tattooist must collect certain information from the patron immediately preceding each procedure: name, address, telephone number and date of birth; driver license number or official picture identification number, or the parent or guardian's number; signature, or signature of parent or guardian; and a health information form. 20 CSR 2267-5.020(1). The form must collect health and other medical information such as the patron's communicable diseases, use of medications including controlled substances, use of illegal substances, and use of alcohol. 20 CSR 2267-5.020(1)(D). The tattooist must retain all information required to be collected from a patron, for a period of two years following completion of the procedure. 20 CSR 2267-5.020(7).

A licensed tattoo establishment must have a panel or other barrier available, sufficient to effectively separate a patron on whom a procedure is being performed from observers or other patrons, for use at the patron's request. 20 CSR 2267-3.010(2)(F). Such panel or barrier is required to be used during tattooing of the genital area. *Id.*

"Reasonably related" is a low threshold and it is met here. As noted above, statutory sodomy is deviate sexual intercourse with a person under 14, involving the genitals of one person and the hand, mouth, tongue, or anus of another person, or a sexual act involving penetration, however slight, of the male or female sex organ or the anus by a finger, instrument or object, done for the purpose of arousing or gratifying the sexual desire of any person, or for the purpose of terrorizing the victim. The crime involves physical contact, of a sexual nature, and the contact can be slight. It is committed against vulnerable persons—children. Given the offensive nature of the crime, a perpetrator presumably commits it when unlikely to be observed and takes advantage of the opportunity when presented.



A tattooist occupies a position of trust with his patrons, who can include minors, inasmuch they are in a vulnerable position during a procedure. To perform his job, a tattooist obviously has close physical contact with the patron, and specific knowledge of the patron's age, and physical and medical condition. He can tattoo a patron's genital area. Tattooing procedures involving some areas of the body can provide the opportunity for a tattooist's contact with a patron's genital area. Tattooing may be performed in private, behind a panel or other barrier, and must be performed in private when it involves the genital area.

The offense of statutory sodomy is reasonably related to the qualifications, functions, or duties of a tattooist.

#### **B. Essential element of fraud, dishonesty or violence**

The Office did not establish that Mr. Zapata's offense contains one of the specified essential elements.

An essential element of a crime is one that the State must prove in every case. *State ex rel. Atkins v. State Bd. of Accountancy*, 351 S.W.2d 483, 485 (Mo. App. K.C.D. 1961). The essential elements of first-degree statutory sodomy under § 566.062.1 are (1) deviate sexual intercourse (2) with a person less than fourteen years of age. Fraud, dishonesty, or violence need not be proven.

Section 566.062 does provide that violent acts, including those causing serious physical injury, or displaying a deadly weapon in a threatening manner, may increase the mandatory minimum sentence. But such acts are not prerequisites to conviction under § 566.062.1.

Violence, dishonesty, and fraud are not essential elements of the offenses Mr. Zapata committed.

#### **C. Moral turpitude**

Mr. Zapata's offenses involved moral turpitude.

Section 324.523 does not define “moral turpitude,” but the concept exists in other disciplinary contexts and has been examined by Missouri courts. For example, in attorney disciplinary cases, the Supreme Court has “long defined moral turpitude as ‘baseness, vileness, or depravity’ or acts ‘contrary to justice, honesty, modesty or good morals.’” *In re Duncan*, 844 S.W.3d 443, 444 (Mo. 1993) (internal citations and quotations omitted). *See also Brehe v. Mo. Dep’t of Elem. and Secondary Educ.*, 213 S.W.3d 720, 725 (Mo. App. W.D. 2007) (same definition used in discipline of teaching certificate).

Not all criminal acts are acts of moral turpitude. *Brehe*, 213 S.W.3d at 725. Missouri courts have examined several types of criminal acts in license discipline cases and held that certain ones always constitute acts of moral turpitude, others may, and some never do. In *Brehe*, the court explained there are three categories of crimes:

1. crimes that necessarily involve moral turpitude, such as fraud (so-called “Category 1” crimes);
2. crimes “so obviously petty that conviction carries no suggestion of moral turpitude,” such as illegal parking (“Category 2” crimes); and
3. crimes that “may be saturated with moral turpitude,” yet do not necessarily involve it, such as willful failure to pay income tax or refusal to answer questions before a congressional committee (“Category 3” crimes).

213 S.W.3d at 725 (*quoting Twentieth Century Fox Film Corp. v. Lardner*, 216 F.2d 844, 852 (9<sup>th</sup> Cir. 1954)). While Category 3 crimes require inquiry into the circumstances, crimes such as murder, rape, and fraud fall into Category 1 because they are invariably regarded as crimes of moral turpitude. *Brehe*, 213 S.W.3d at 725.

In a California case, the court concluded that a California offense, similar to the one at issue here, was a crime of moral turpitude, because the violation was “the ultimate breach of social duty and public morals[.]” *People v. Massey*, 192 Cal. App. 3d 819, 823 (1987). Such

description suggests the crime could be classified as a Category 1 crime. But we have no similar case law in Missouri. Even if the offense is a Category 3 crime, we have little difficulty concluding under the circumstances presented here that it is an offense of moral turpitude.

Specifically, the child was between 5 and 7 years old at the times Mr. Zapata committed his offenses. He touched the child's vagina with his penis, mouth, and fingers; and placed his penis in her mouth. His acts were base, vile and depraved, and contrary to justice, honesty, modesty and good morals. Therefore, his offenses involved moral turpitude.

### **Summary**

The Office has cause under § 324.523.2(2) to discipline Mr. Zapata's tattooist license, because there was a final adjudication and finding of guilt in a criminal proceeding against him, and the offenses were reasonably related to the qualifications, functions, or duties of a tattooist, and the offenses involved moral turpitude.

SO ORDERED on November 5, 2013.

*\s\ Alana M. Barragán-Scott*  
ALANA M. BARRAGÁN-SCOTT  
Commissioner